

DEPARTMENT OF STATE REVENUE

LETTER OF FINDINGS NUMBER: 98-0197 RO

**Responsible Officer Liability — Duty to Remit Sales and Withholding Taxes
For Tax Periods: 1996 Through 1997**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Responsible Officer Liability — Duty to Remit Sales and Withholding Taxes

Authority: IC 6-2.5-2-1; IC 6-2.5-9-3; IC 6-3-4-8
Indiana Department of State Revenue v. Safayan, 654 N.E.2d 270 (Ind. 1995).

Taxpayer protests the Department's determination of responsible officer liability for sales and withholding taxes owed but not paid during the assessment periods.

STATEMENT OF FACTS

Taxpayer and his brother each owned fifty-percent (50%) of a corporation that was engaged in retail sales. Both were listed as officers and directors of the corporation. In addition to his officer and director duties, taxpayer, managed the store, kept the books, and wrote and signed checks.

Over time, the business relationship between the brothers deteriorated. Being a family business, the dissolution took several years to complete. In June of 1994, taxpayer relinquished all management responsibilities and quit working in the store. However, taxpayer continued to keep the store's books and write checks on the store's account until April 1995. Finally, in June of 1996, taxpayer resigned as officer and director of the corporation.

As a Registered Retail Merchant in the state of Indiana, the corporation was required to collect and remit sales tax on its sales of merchandise. As an employer, the corporation was required to timely remit withholding taxes. Starting in February 1996, the corporation was late in remitting

those taxes. Eventually, the corporation quit remitting the proper amounts. As a result, the Department found that taxpayer, as a responsible officer, was personally liable for the unpaid taxes and penalties that the corporation owed the state.

I. Sales and Withholding Taxes — Responsible Officer

DISCUSSION

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." IC 6-2.5-2-1.

Individuals may be held personally responsible for failing to remit Indiana sales tax. In determining who may acquire personal liability, the Department finds IC 6-2.5-9-3 instructive.

An individual who:

(1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and

(2) has a duty to remit state gross retail or use taxes (as described in IC 6-2.5-3-2) to the department;

holds those taxes in trust for the state and is personally liable for the payment of those taxes plus any penalties and interest attributable to those taxes, to the state.

An income tax is assessed on the wages that employers pay to their employees. The employer is responsible - and liable - for deducting, retaining, and paying "the amount prescribed in [the] withholding instructions." IC 6-3-4-8(a). Like the sales tax, employers hold this withholding tax in trust for the state.

IC 6-3-4-8(f) states in part:

All money deducted and withheld by an employer shall immediately upon such deduction be the money of the state, and every employer who deducts and retains any amount of money under the provisions of IC 6-3 shall hold the same in trust for the state of Indiana...

In order to determine which persons are personally liable for the payment of these "trust" taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department.

The method of determining whether a given individual is a responsible person is the same under the gross retail tax and the withholding tax.... An individual is

personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... *The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that they are paid. Department of Revenue v. Safayan*, 654 N.E.2d 270,273 (Ind. 1995). (Emphasis added).

In its search to find those employees and officers who had the requisite authority to authorize such payments, the court in *Safayan* identified three relevant factors:

- (1) the person's position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person's employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

Id.

Because taxpayer was an officer (Secretary/Treasurer), director, and major shareholder (50%) in this closely held corporation, taxpayer was strongly presumed to have had a duty to remit these taxes. Consistent with *Safayan* and our Indiana statutory language, the Department has identified taxpayer as a responsible officer who was personally liable for the payment of these sales and withholding taxes.

In support of its position, the Department notes that on the corporation's 1995 Indiana Annual Report of Business Corporation (Form 41328) filed with the Indiana Secretary of State on January 29, 1996, taxpayer was listed as an officer of the corporation (Secretary/Treasurer), director, and its registered agent. On the corporation's application for sales and withholding taxes that was filed with the Department on January 9, 1991, taxpayer was listed as Vice-President and Secretary/Treasurer of the corporation. Additionally, taxpayer signed the application as the corporation's authorized agent.

Taxpayer concedes that he was actively involved in the corporation's business activities prior to June 22, 1994. Taxpayer argues, however, that his subsequent actions to distance himself from the corporation should serve to immunize him from any responsible officer liability.

Taxpayer managed the store from its inception (1991) until he relinquished management responsibilities to his brother on June 22, 1994. On April 4, 1995, taxpayer relinquished all check writing responsibilities and no longer had access to the corporate checkbook. Taxpayer has introduced a letter dated December 14, 1995, to show his intention to end this business relationship with his brother. Additionally, taxpayer offered a signed affidavit, dated April 23, 1998, attesting to the truth of these events.

The business relationship between the brothers formally terminated on June 28, 1996, when taxpayer, in a special meeting of the corporate shareholders, resigned as officer and director.

Taxpayer, at this time, also transferred his shares of stock in the corporation to his brother. Minutes of this special shareholders' meeting support taxpayer's statements.

The initial sales tax delinquency occurred for the period ending February 29, 1996. The initial withholding tax delinquency occurred for the period ending June 30, 1996. Taxpayer notes that all of these delinquencies occurred eleven (11) months after taxpayer relinquished his check writing responsibilities. Taxpayer points out that all of the withholding tax delinquencies occurred after he had relinquished all of his duties and responsibilities as an officer, director, and shareholder of the corporation.

Documents filed with the Indiana Secretary of State support taxpayer's narrative. As previously stated, the corporation's 1995 Indiana Annual Report of Business Corporation (filed 1/29/96), listed taxpayer as a corporate officer (Secretary/Treasurer), director, and registered agent. Contrast taxpayer's relationship with the corporation in 1995 with the information found in the corporation's Indiana Biennial Report of Business Corporation for the years 1996 and 1997 (filed 6/9/97). On this report, taxpayer was no longer listed as a corporate officer or director. The report also shows a change in the name of the corporation's registered agent - from taxpayer, to a third party.

The sales and withholding tax liabilities at issue were for periods ending February 1996 to October 1997. The information provided to the Department indicates that prior to June 28, 1996, taxpayer occupied the corporate positions of officer and director, and held a fifty-percent (50%) ownership position. Consequently, taxpayer was properly named a responsible officer for those liabilities. However, the evidence also indicates that on June 28, 1996, taxpayer severed all of his ties with the corporation. Therefore, for those liabilities generated from taxable periods beginning after June 28, 1996, taxpayer can not be found to be a responsible officer.

FINDING

Taxpayer's protest is denied to the extent that taxpayer is found to be a responsible officer and liable for assessments generated before June 28, 1996. Taxpayer's protest is sustained for those liabilities that were generated in periods beginning after June 28, 1996.